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# **FEDERAL PROCUREMENT OF COMMERCIAL AUTOMATIC DATA PROCESSING EQUIPMENT: GSA SCHEDULE CONTRACTS**

**Brett A. Alcala†**

## **I. INTRODUCTION**

The schedule contracts maintained by the General Services Administration (GSA) are the U.S. Government's primary source of supply for commercially available general purpose automatic data processing equipment (ADPE). Each year the GSA solicits proposals from ADPE suppliers interested in offering their products to various Federal agencies who are authorized to place orders against these schedule contracts. ADPE schedule contracts are essentially basic ordering agreements with prices and terms prenegotiated between the GSA and the schedule contractor. For ADPE purchases that do not exceed \$300,000, each agency may place orders directly against the schedule without obtaining prior approval from the GSA. Through the Government's unitary purchasing power, diverse agencies are able to obtain prices and terms comparable to the supplier's most favored customers. These contracts are valued by Federal agencies because they offer a more streamlined and cost effective approach for acquiring commercial ADPE in comparison to a full scale competitive procurement effort.

Despite GSA's aggressive discount practices and unbalanced contract terms, ADPE schedule contracts are also valued by commercial companies for their convenience as well as for their promise of tapping into the tremendous Federal ADPE marketplace. During the 1988 fiscal year, the GSA spent approximately 1.9 billion dollars under schedule contracts for general purpose ADPE and related systems and software.<sup>1</sup> ADPE schedules are frequently a company's first introduction to the procurement process. For the

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1. The \$1.9 billion figure is divided into the following categories: rental (\$57,207,000), purchase (\$1,147,928,000), maintenance (\$379,785,000) and software (\$321,865,000). "Reported Dollar Volume of ADP Contractors Under ADP Schedules for FY 88," General Services Administration (December 28, 1988).

uninitiated, the procedures for awarding and negotiating ADPE schedules are fairly complex. With this in mind, this article will focus on the following objectives: first, to provide a focused analysis on the major issues applicable to ADPE schedule contracts; and second, to provide commercial companies with the necessary information to compete in this unique market.

## II. GSA'S PROCUREMENT AUTHORITY

Virtually every sector of the Federal Government relies heavily on ADPE. The Federal procurement of ADPE can generally be divided into three categories of customers: the Department of Defense (DOD), the GSA, and other civilian agencies. With the passage of the Brooks Act<sup>2</sup> in 1965, Congress early recognized a need for the coordinated and efficient purchase, lease and maintenance of ADPE by Federal Agencies.<sup>3</sup> To this end, the GSA is vested with oversight authority for nearly every acquisition involving ADPE and is responsible for developing standard procurement practices for most of these agencies. However, excluded from the GSA's authority are DOD acquisitions involving intelligence or military activities and purchases by the Central Intelligence Agency.<sup>4</sup> Exempt purchases are made by the agency directly with the contractor. Routine DOD administrative and business applications are not exempt from the Brooks Act and must be procured subject to the GSA's authority.<sup>5</sup>

Under authority of the Brooks Act, the GSA may conduct

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2. 40 U.S.C.A. § 759(a) (West 1986 & Supp. 1989), Pub. L. No. 89-306.

3. See also Federal Property & Administration Services Act, 40 U.S.C.A. § 481(a)(1) (West 1986 & Supp. 1989) (authorizing the GSA to prescribe policies and methods of procurement and supply of personal property and nonpersonal services).

4. 40 U.S.C.A. § 759 states that GSA's authority does not apply to:

(B) radar, sonar, radio, or television equipment;

(C) the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of which—

(i) involves intelligence activities;

(ii) involves cryptologic activities related to national security;

(iii) involves the command and control of military forces;

(iv) involves equipment which is an integral part of a weapon or weapons system; or

(v) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include data processing equipment used for routine administrative and business applications such as payroll, finance, logistics, and personnel management; or

(D) the procurement of automatic data processing equipment or services by the Central Intelligence Agency.

*Id.* § 759(a)(3).

5. *Id.*

procurements directly with suppliers, delegate its procurement authority to user agencies, or award ADPE schedule contracts against which all Federal agencies are permitted to place orders. The volume of orders a company can expect to receive under the schedule will be affected by whether the items to be procured are ADPE or non-ADPE. By regulation, procuring agencies have general authority to purchase ADPE without first obtaining GSA approval under a blanket delegation of authority (DPA).<sup>6</sup> A specific DPA is not required for such purchases if it complies with the detailed procedures concerning ADPE schedule purchases set forth in the Federal Information Resources Management Regulations (FIRMR).<sup>7</sup> However, an agency's blanket DPA can be revoked when it is determined that there are "systemic problems" with the manner in which the procuring agency conducts awards under the ADPE schedule program.<sup>8</sup>

Each year the GSA's Information Resources Management Service (IRMS) negotiates schedules for most types of commercially available ADPE. The GSA's ADPE schedule contracts cover mainframes and mini computers, optical systems, software, peripherals and accessories such as printers, terminals, storage devices, modems, multiplexors, boards and optical disk readers.<sup>9</sup> ADPE is defined by statute as "any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information."<sup>10</sup> The term includes computers, ancillary equipment, software, firmware, and support services.<sup>11</sup> More specifically, the acronym "ADPE" is defined in the FIRMR as:

general purpose *commercially available*, mass produced automatic data processing devices; i.e., components and the equipment systems configured from them together with *commercially*

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6. The Federal Information Resources Management Regulations, 41 C.F.R. § 201-23.104 (1988) [hereinafter FIRMR] (the principle authority for ADPE schedule procurements). See also Federal Acquisition Regulations, 48 C.F.R. § 39.002 (1988) [hereinafter FAR] (stating, "[t]he Administrator of General Services has certain exclusive authorities regarding acquisition of information resources which may be delegated to agencies. The FIRMR contains blanket delegations and rules for requesting specific delegations.")

7. *Digital Services Group, Inc.*, 87-1 B.C.A. (CCH) ¶ 19,555, at 98,838 (Jan. 7, 1987).

8. *ISYX*, 88-2 B.C.A. (CCH) ¶ 20,781 at 105,000 (April 2, 1988); *motion for reconsideration denied*, *Id.* at ¶ 20,815.

9. The GSA IRMS also maintains a separate schedule for telecommunications equipment and services. Although the telecommunications schedules are not specifically covered in this article, much of the discussion herein is equally applicable to these schedules.

10. 40 U.S.C.A. § 759(a)(2)(A).

11. 40 U.S.C.A. § 759(a)(2)(B).

*available* software packages that are provided and are not priced separately, and all documentation and manuals relating thereto . . . that are designed to be applied to the solution or processing of a variety of problems or applications and are not specially designed (as opposed to configured) for any specific application.<sup>12</sup>

Excluded from the FIRMR definition of ADPE is specially designed systems and components that have no general purpose applicability, do not have a commercial market or cannot be used to process a variety of applications.<sup>13</sup> Thus, the blanket DPA and streamlined procedures under the schedule program are intended to benefit primarily commercial off-the-shelf products. Purchases requiring specialized items or equipment used for national security purposes must be made under separate authority.

### III. THE ADPE SCHEDULES

ADPE schedule contracts contain a complete set of terms, conditions and unit prices from which other agencies may place orders. GSA schedule contracts are essentially fixed-price, indefinite quantity contracts for the lease, purchase or maintenance of equipment and software. These contracts are nonmandatory, however, and government agencies are not obligated to purchase equipment listed under the schedule. Although such contracts appear to be illusory and without consideration, they are binding against contractors.<sup>14</sup> ADPE schedule contracts are preferred by agencies for their speed and convenience in comparison to the time and expense required to conduct a competitive solicitation. As stated in the regulations:

Schedule contracts are designed to provide economic advantages to the Government (when compared to the open competitive commercial marketplace for comparable terms, conditions, and circumstances) at low administrative expense primarily for lower value acquisitions.<sup>15</sup>

ADPE resources are procured under either Sections A, B or C of Federal Supply Contract (FSC) Group 70. Section A schedules cover software and general purpose ADPE and peripherals used

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12. FIRMR, *supra* note 6, § 201-2.001 (emphasis added). The blanket DPA procedures only apply to items which meet the narrower definition of "ADPE" contained in the FIRMR.

13. *Id.*

14. See generally CORBIN, CORBIN ON CONTRACTS § 146 (ed. 1987) (stating, "[t]he fact that the promise of the government is unenforceable does not render it an insufficient consideration for the promise of the other party to the contract.").

15. FIRMR, *supra* note 6, § 201-20.012-2, *repealed* effective August 28, 1989.

primarily on-line (e.g., main frames and mini computers as well as optical systems). Section A schedule contracts are issued in February or March of each year and cover the time period extending from November 1st through September 30th. Section B schedules cover general purpose ADPE and peripherals used primarily off-line (e.g., printers, terminals, modems and storage devices). Section C schedules cover end-user computers (normally microcomputers/personal computers and software) and micro optical systems. Section B and C schedules are issued as a single solicitation in October or November and cover the time period extending from April 1st through March 31st. Prospective contractors who wish to participate on the schedules should request a Solicitation Mailing List Application (Standard Form 129) from the GSA.<sup>16</sup> The GSA, recognizing that it is often difficult to determine the appropriate schedule in which a product belongs, recommends that prospective contractors submit technical literature along with their application to ensure that the GSA places them in the correct program and sends them the appropriate contract information.

#### IV. ADPE SOURCE SELECTION PROCEDURES

##### A. *Requirement for Competition*

The overriding requirement of government contracts is that agencies must obtain "full and open competition" in awarding contracts.<sup>17</sup> The regulations applicable to ADPE procurements are very specific about the need for competition to ensure that the lowest overall cost to the Government is obtained.<sup>18</sup> Although orders placed against ADPE schedules are not competitively awarded, they will be considered to have been made under competitive procedures if the agency can demonstrate that the award was made at the lowest cost.<sup>19</sup> In determining lowest cost, agencies cannot ignore

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16. For necessary forms and information contact:

General Services Administration  
Information Resources Management Service  
Schedules Division  
18th and F Streets NW  
Washington, D.C. 20405.

17. 10 U.S.C.A. § 2304 (West 1987 & Supp. 1989); 41 U.S.C.A. § 253 (West 1987 & Supp. 1989); FAR, *supra* note 6, § 6.101(a).

18. FIRMR, *supra* note 6, § 201-11.001(a). See FAR, *supra* note 6, § 39.001 (stating that "[i]n acquiring information resources, acquisition personnel shall follow the policies and procedures contained in the FAR except in those areas where the FIRMR (41 CFR Ch. 201) prescribes special policies, procedures, provisions, or clauses").

19. 41 U.S.C.A. § 259(b)(3) (West 1987 & Supp. 1989); FAR, *supra* note 6, § 6.102(d)(3); FIRMR, *supra* note 6, §§ 201-11.001(C) & 201-32.206(a)(2).

proposals submitted by alternative sources that are not on the GSA's nonmandatory ADPE schedule.<sup>20</sup>

Specific procedures, which vary depending upon the dollar amount of the item, must be followed before an agency may order from the schedule. In accordance with the agency's blanket DPA, initial orders for ADPE against a schedule must meet the following requirements:

- (1) The order must not exceed the applicable contract maximum order limitation (MOL);<sup>21</sup>
- (2) The purchase price of the items covered cannot exceed \$300,000 (unless a specific DPA is obtained from GSA);<sup>22</sup>
- (3) A synopsis of the intent to place an order for ADPE which exceeds \$50,000 must be published in the *Commerce Business Daily* (CBD) 15 calendar days before placing the order;<sup>23</sup> and
- (4) The agency must consider any non-schedule contractor responses to the CBD synopsis and make a determination whether the lowest overall cost would be better achieved through a competitive procurement.

#### B. *Maximum Order Limitation (MOL)*

Each GSA schedule will set forth a MOL specifying a ceiling that agency orders may not exceed.<sup>24</sup> Because the GSA will emphatically negotiate based upon the contractor's best commercial prices, the MOL can serve as a basis for exempting volume discounts for non-schedule orders which exceed the MOL.<sup>25</sup> Most litigation concerning the MOL clause, however, concerns agency attempts to circumvent the MOL provisions by fracturing orders into quantities below the MOL threshold to avoid the need to conduct a full scale procurement. An agency's authority to order under the schedule can be suspended where an agency places multiple orders under a schedule as a means of avoiding the MOL.<sup>26</sup> Competing contractors can monitor agency awards and submit a protest for any MOL violations by reviewing published schedule awards in the CBD.<sup>27</sup>

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20. FIRMR, *supra* note 6, § 201-32.206(a)(3).

21. FIRMR, *supra* note 6, §§ 201-23.104-1 & 201-32.206(b).

22. *Id.*

23. FIRMR, *supra* note 6, § 201-32.206(f).

24. A maximum order limitation of \$300,000 is specified under GSA's ADPE Schedule No. GSC-KESF-B-C-00042, FSC Group 70, Sections B & C, for the period of April 1, 1990 through March 31, 1991, Clause C.2(B)(1), at 14.

25. *Information Handling Services*, 88-2 B.C.A. (CCH) ¶ 20,789 (April 19, 1988).

26. *Kavouras, Inc.*, Comp. Gen. B-220058.2 (Feb. 11, 1986) (unpublished).

27. FIRMR, *supra* note 6, § 201-32.206(f) (requiring publication of an agency's intent

### C. *Synopsis Requirements*

Before placing an order for ADPE which exceeds \$50,000, the agency must publish a synopsis of its intent to place the order in the CBD fifteen calendar days before placing the order to allow non-schedule suppliers an opportunity to compete for the agency's business.<sup>28</sup> The synopsis, however, is not to be confused with a formal solicitation document since an award cannot be made solely on the basis of a competitor's response to the notice. As stated in the regulations:

The schedule order synopsis technique provides agencies with both the GSA negotiated schedule prices (derived from discounting prices in the competitive commercial marketplace) and such additional product and cost information as might be submitted by potential nonschedule suppliers in response to the CBD notification.<sup>29</sup>

After considering any responses received following the CBD synopsis, the agency must determine whether the lowest overall cost to the Government will be achieved by ordering from the schedule or by issuing a new competitive solicitation.<sup>30</sup> All results of the agency's analysis must be documented. If a new solicitation is issued, the schedule contractor will be permitted to compete on the follow-on solicitation and submit a separate price proposal. The follow-on solicitation will contain substantially the same terms and conditions as the schedule contract, although the award will be for a single quantity under a non-schedule contract directly with the agency. Since the follow-on procurement will be for a much smaller quantity than promised under the schedule, the regulations recognize that "some offerors may not agree to the solicitation terms and conditions that schedule contractors have accepted."<sup>31</sup>

Notwithstanding the right of non-schedule contractors to compete for schedule business, companies with ADPE schedules have multiple advantages over non-schedule companies in obtaining government business.<sup>32</sup> Since agency orders under \$50,000 do not have to be publicized in advance, non-schedule vendor's are generally unaware of the intended purchase and unable to timely submit a com-

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to place an order). *But cf.* FAR, *supra* note 6, § 5.301 (stating a separate requirement for publication in the CBD of awards over \$25,000).

28. FIRM, *supra* note 6, § 201-32.206(f).

29. FIRM, *supra* note 6, § 201-32.206(g).

30. *Id.*

31. FIRM, *supra* note 6, § 201-32.206(g)(2)(C).

32. *InSyst Corporation*, 89-2 B.C.A. (CCH) ¶ 21,782 (May 11, 1989).



petitive proposal for consideration by the agency.<sup>33</sup> Even when the acquisition exceeds \$50,000, the non-schedule company must spend time and money responding to and negotiating each separately proposed acquisition whereas schedule companies already have a prenegotiated arrangement.<sup>34</sup> The non-schedule contractor's proposal price could also be handicapped since the agency is permitted to add the cost of conducting a competitive procurement to the non-schedule vendors' prices when determining the lowest overall cost alternative.<sup>35</sup> If the agency has an urgent need for ADPE, the schedule contract is the most logical alternative.<sup>36</sup>

When the agency fails to adhere to the detailed regulatory procedures, it risks having the contract award overturned through a bid protest action. An improper CBD synopsis or an improper award following a synopsis response can serve as the basis for a bid protest seeking suspension of the agency's DPA to procure the ADPE in question.<sup>37</sup> An agency's DPA to place a particular order will be canceled when the agency fails to synopsize in the CBD its intent to purchase greater than \$50,000 or fails to document in the procurement file an analysis indicating that the schedule awardee's offer was the lowest alternative.<sup>38</sup> Competitors who respond to the CBD synopsis are entitled to prompt notice of issuance of the purchase order (which is the same as award) and an agency's failure to do so deprives them of their right to seek a possible suspension of the agency's DPA.<sup>39</sup> If lower priced functionally equivalent equipment is quoted by a competitor, it is improper to order equipment under an ADPE schedule without adequate justification.<sup>40</sup> A synopsis which omits an essential requirement will fail to meet the need for an "accurate description of equipment or services to be ordered."<sup>41</sup> For instance, where an agency failed to include a network requirement, the General Services Administration Board of Contract Appeals (GSBCA) has held that this not only precluded

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33. *Id.*

34. *Id.*

35. *Id.* (citing FIRMR, *supra* note 6, § 201-32.206(a)(3)(i)).

36. *Id.*

37. *See infra* Part V.

38. *See supra* note 5.

39. *Storage Technology Corporation*, 89-1 B.C.A. ¶ 21,498 (Jan. 3, 1989).

40. *NCR Corporation*, 86-1 B.C.A. (CCH) ¶ 18,576 (Nov. 18, 1985) (where the agency interpretation of the requirement as a "specific make and model specification" left only one firm who could meet the design and where proper justification or approval to use a "specific make and model specification" was not obtained).

41. *North American Automated Systems Co. Inc.*, 87-3 B.C.A. (CCH) ¶ 20,203 (Sept. 24, 1987).

potential offerors from meaningfully responding, but precluded the agency from determining whether alternative sources could meet the agency's needs at the lowest overall cost.<sup>42</sup>

## V. BID PROTESTS

A bid protest, in its most common form, involves a complaint filed by an unsuccessful bidder alleging improper conduct by the Government during award of the contract. Although ADPE schedule contracts are not competitively awarded, they are susceptible to bid protests due to the very specialized and detailed procedural requirements with which the agency must comply.<sup>43</sup>

Protests are based upon the "private attorney general" concept which encourages interested parties to help guard against violations of the procurement rules and procedures. Protests are effective devices for preventing unfair awards of contracts to competitors. Any party who has an interest in the outcome of a government contract generally has standing to protest the contract award. While the vast majority of cases involve allegations that the disappointed offeror was wrongfully excluded from the award process, they can also include the following: withdrawal or modification of a bid based on alleged mistakes; overly restrictive specifications; omission of a required provision; and ambiguous or indefinite evaluation factors.

Traditionally, the General Accounting Office (GAO) was the primary authority for obtaining administrative rulings on protest matters.<sup>44</sup> Although there was no explicit statute giving the GAO authority to consider bid protests, GAO's authority gradually evolved out of its longstanding authority to settle claims and accounts in which the United States was either a debtor or creditor.<sup>45</sup> With the implementation of the Competition in Contracting Act (CICA) in 1985, Congress specifically gave the GAO statutory au-

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42. *Id.* The protester was also extremely successful in protesting the repeated use of the term "total system responsibility" by various agencies in their order synopses on the basis that it was an ambiguous notice of the intended support requirements. *See also North American Automated Systems Co., Inc.*, 87-3 B.C.A. (CCH) ¶ 20,203 (against the Department of Health and Human Services); 87-3 B.C.A. (CCH) ¶ 20,207 (against the Selective Service System); 87-3 B.C.A. (CCH) ¶ 20,208 (against the National Institute of Health acting on behalf of the National Lung and Blood Institute).

43. *See supra* Part IV(C).

44. Protests through the General Accounting Office (GAO) are heard through the head of the GAO, the Comptroller General.

45. 31 U.S.C.A. § 3526(a) (West 1983 & Supp. 1989).

thority to decide bid protests.<sup>46</sup> CICA also amended the Brooks Act giving the GSBICA concurrent authority with the GAO to decide bid protests involving the procurement of ADPE.<sup>47</sup>

CICA does not permit forum shopping and a contractor's election between the two forums will be binding.<sup>48</sup> A protest filed initially with the GSBICA, but dismissed for lack of jurisdiction, will not be considered by the GAO even if the GAO protest could be filed on time.<sup>49</sup> However, in one instance, a protest originally filed with the GAO was accepted by the GSBICA since the protester immediately withdrew the GAO protest after filing and the procuring agency was unable to show any prejudice.<sup>50</sup>

### A. *Protesting to the Contracting Agency*

The Government recommends that protesters should first lodge their complaint with the agency's contracting officer.<sup>51</sup> Filing an initial protest with the agency can be advantageous in terms of maintaining customer relations and avoiding unnecessary administrative procedures, particularly when the matter can be resolved informally without resorting to litigation. The timing of a protest and the manner in which it is filed can affect the type of relief available. When a protest to the agency is made before contract award, the contracting officer must withhold contract award pending resolution of the protest.<sup>52</sup> However, the contracting officer may continue

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46. Competition in Contracting Act, Procurement Protest System, Pub. L. No. 98-369, 98 Stat. 494 (1984) (codified at 31 U.S.C.A. §§ 3551-3556 (West 1983 & Supp. 1989)).

47. *Id.* The GSBICA's authority was originally implemented for a three year test period commencing January 15, 1985, but has since been made permanent. Deficit Reduction Act of 1984, Pub. L. No. 99-500, § 2713 98 Stat. 1184 (as amended by the Paperwork Reauthorization Act of 1986, § 831, Title VIII of the Continuing Appropriations Resolution, Pub. L. No. 99-500).

GAO and GSBICA protests are administrative remedies. In contrast, judicial forms of relief are also available before the U.S. Claims Court and Federal District Courts. In certain instances, a protesting party may have more than one forum consider their protest, such as obtaining an injunction from the court while a protest is pending before the GAO or GSBICA. The GAO, however, will ordinarily dismiss any protest that is pending before a court. 4 C.F.R. § 21.3(f)(11) (1989). For a detailed discussion of the equitable jurisdiction of the courts with respect to bid protests, *see generally*, Villet, *Equitable Jurisdiction in Government Contract "Bid Protest" Cases: Discerning the Boundaries of Equity*, 17 PUB. CONT. L.J. 152 (1987).

48. 40 U.S.C.A. § 759(h) (West 1986 & Supp. 1989).

49. *System Automation Corp.*, Comp. Gen. Dec., B-218276.2 (1985).

50. *North American Automated Systems Co.*, 85-3 B.C.A. (CCH) ¶ 18,055 (April 10, 1985) (where the protesting party promptly withdrew the protest after learning that the Department of Justice was leading a constitutional attack on the GAO's jurisdiction).

51. FAR, *supra* note 6, § 33.102(b)(1).

52. FAR, *supra* note 6, § 33.103(a).

with award when it is determined (a) that there is an urgent requirement for the supplies or services, (b) that undue delay will result, or (c) that prompt award is advantageous to the Government.<sup>53</sup> Conversely, when a protest is filed after award, performance will not be suspended unless it appears likely that the award will be invalidated.<sup>54</sup> Aside from this pre-award and post-award filing distinction, most procuring agencies do not impose time limits on when a protest must be filed.

Nevertheless, both the GAO and GSBCA impose strict timing requirements for the filing of protests. In order for a protest to be considered timely by either of these forums, a protest initially filed with the contracting agency must be received by the GAO or GSBCA within the narrow time limits established under the applicable rules for each forum. Protests initially made to the contracting agency must be carefully monitored to ensure that the GAO and GSBCA timing requirements have not commenced or lapsed.<sup>55</sup> Contractors are deemed to be on constructive notice of each forum's timeliness requirements, despite any express or implied waiver of the filing deadline by the contracting agency.<sup>56</sup> Furthermore, there is a real risk that the agency's evaluation of the protest will be influenced by whether or not the matter will be subject to further review by the GAO or GSBCA.

#### B. *Protests Before the General Services Board of Contract Appeals (GSBCA)*

Concerned with the increasing volume of ADPE procurements and the complexity of the technologies involved, Congress sought "a unique and innovative method" for resolving protests which would be less "cumbersome and prolonged" than existing procedures.<sup>57</sup> Hence, with the passage of the CICA, ADPE contractors were afforded two alternative protest forums: the GAO and the GSBCA.<sup>58</sup> The GSBCA's jurisdiction, however, is subject to the Brooks Act which expressly limits the Board's protest authority to procurements involving ADPE.<sup>59</sup>

The most remarkable characteristic of GSBCA protests is the compressed time frame within which the Board and the parties are

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53. *Id.*

54. FAR, *supra* note 6, § 33.103(b).

55. *See infra* Parts V(B) & (C).

56. Comp. Gen. Dec., B-231944 (August 8, 1988) (unpublished).

57. H.R. Rep. No. 98-861, 98th Cong., 2d Sess. 1431 (1984).

58. *See supra* note 45.

59. *See supra* note 2.

required to work. Under CICA, the Board is required to issue a decision on the merits within 45 working days after the protest is filed.<sup>60</sup> Despite this narrow time frame, the parties are afforded an opportunity to conduct discovery subject to judicial enforcement of the strict timetable.<sup>61</sup> Discovery methods include: oral or written depositions, written interrogatories, requests for production of documents, and requests for admissions.<sup>62</sup> In the case of protests, the usual 30-day period to respond to discovery requests is shortened to ten days.<sup>63</sup> The Board has expressly noted that its procedures are complex and "not written for parties unschooled in the niceties of federal civil procedure" and that the Board will not "tolerate delays created by parties who do not read [the Board's] orders or who are unfamiliar with civil proceedings conducted at a break-neck pace and do not seek clarifications to dispel any confusion."<sup>64</sup>

### 1. Interested Parties

Only protests filed by an "interested party" will be considered by the GSBICA. An "interested party" is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."<sup>65</sup> A party who has elected to file a protest before the GAO will not be an "interested party" for purposes of a protest involving the same contract before the GSBICA.<sup>66</sup>

An interested party who is not part of the initial protest action, can still participate in the protest as an "intervenor of right."<sup>67</sup> By filing a notice of intervention within four days after receipt of a notice of protest, an intervenor of right may participate fully as a

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60. 40 U.S.C.A. § 759(h)(4)(B).

61. 48 C.F.R. § 6101 (1988) [hereinafter GSBICA Rule(s)] (codification of GSA Board of Contract Appeals protest procedures).

62. GSBICA Rule 15(a), *supra* note 61, § 6101.15(a).

63. GSBICA Rule 17, *supra* note 61, § 6101.17.

64. *CompuCom Security, Inc.*, 85-3 B.C.A. (CCH) ¶ 18,378 (Aug. 16, 1985).

65. GSBICA Rule 1(b)(4), *supra* note 61, § 6101.1(b)(4).

66. The GSBICA typically has priority over GAO protests when multiple protests involving the same procurement are filed with both the GAO and GSBICA. When a protest involving the same procurement has been filed by an interested party with the GSBICA, a protest filed by another interested party before the GAO will be dismissed with deference to the GSBICA regardless of which protest was filed first. *Air Land Forwarders Suddath, Inc.*, Comp. Gen. Dec., B-218276.1 (1985) (unpublished). Should the GSBICA, however, dismiss the protest on jurisdictional grounds, the GAO will allow the protesting party to reinstate the protest within 10 days of the dismissal. *AT&T Technologies, Inc.*, Comp. Gen. Dec., B-221379 (1986) (unpublished).

67. GSBICA Rule 1(b)(6), *supra* note 61, § 6101.1(b)(6).

party.<sup>68</sup> Any new issues raised by the intervenor of right are subject to the general timeliness requirements set forth in the GSBICA rules.<sup>69</sup> Since the awardee of the contract subject to a protest is not automatically included as a party, it is a recommended defensive strategy that the awardee file a notice of intervention in order to participate in the defense of the contract award.

## 2. Timeliness

Many meritorious protests are dismissed due to the short time frame in which disappointed bidders must file their protest. Both the GAO and the GSBICA have implemented similar timing requirements. A protest that is based upon improprieties existing in the solicitation (or subsequently incorporated therein) must be filed before the bid/proposal submission deadline.<sup>70</sup> For improprieties that are not apparent in the solicitation documents, the protest must be filed within "10 [working] days after the basis for the protest is known or should have been known, whichever is earlier."<sup>71</sup> A protest filed beyond the permissible period will not be considered untimely *per se* when there was no CBD synopsis, the protester had no knowledge of the order, and the protest was promptly filed after learning of placement of the order under the schedule.<sup>72</sup> If a protest is initially filed with the contracting agency in a timely manner, the party will then have ten additional working days to file a formal protest with the GSBICA commencing upon receipt of "formal notification of, or actual or constructive knowledge of, initial adverse agency action" concerning the protest.<sup>73</sup> Given the broadness of the phrase "constructive knowledge of adverse agency action," protesters must be careful about sitting on their rights.

## 3. Remedies

When a timely protest is filed on or before the tenth day after contract award, the protester may request that the Board hold a hearing to determine whether to suspend the procurement pending a decision on the merits.<sup>74</sup> The right to request a suspension, an

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68. GSBICA Rule 5(b)(4), *supra* note 61, § 6101.5(b)(4).

69. *Id.* See also *infra* Part V(B)(2).

70. GSBICA Rule 5(b), *supra* note 61, § 6101.5(b).

71. GSBICA Rule 5(b)(3)(B), *supra* note 61, § 6101.5(b)(3)(ii).

72. *DatagraphiX*, 88-3 B.C.A. (CCH) ¶ 20,845 (June 8, 1988).

73. GSBICA Rule 5(b)(3)(C), *supra* note 61, § 6101.5(b)(3).

74. GSBICA Rules 5(b)(3)(D) & 19(a)(2), *supra* note 61, §§ 6101.5(b)(3)(D) & 6101.5(b)(3) (suspension hearings are to be held no later than ten days after the filing of the protest).

interim measure likened to an injunction, can greatly enhance the scope of the protesting party's expected relief. Unlike protests before the GAO in which the GAO defers to the contracting agency's determination whether to suspend a contract, the GSBCA makes its own "de novo" determination. The standard applied by the Board is whether "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board."<sup>75</sup> Procurement agencies bear a heavy burden in meeting the "urgent and compelling circumstances" standard.<sup>76</sup>

When the GSBCA determines that the agency has violated a statute, regulation or condition of its DPA, the Board may suspend, revoke, or revise the DPA applicable to the challenged procurement.<sup>77</sup> In addition, the GSBCA can direct that an improperly awarded contract be terminated for convenience.<sup>78</sup> The Board cannot direct the procuring agency to return goods that have already been delivered and accepted.<sup>79</sup> The Board has on occasion also directed that an award be made to the protester.<sup>80</sup> Nevertheless, when the agency's authority to purchase under the original contract is suspended, the protester will always have the opportunity to participate in any follow-up procurement.

Proposal preparation expenses and protest costs, including reasonable attorney's fees, may be recovered by successful parties by filing a motion within 30 days after the protest is sustained.<sup>81</sup> Protest costs will be awarded if the protester succeeds on a "significant issue in the litigation that achieves some of the benefit it sought in

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75. GSBCA Rule 19(d), *supra* note 61, § 6101.19(d).

76. Urgent and compelling circumstances have been found in the following cases: *Telos Field Engineering*, 89-1 B.C.A. (CCH) ¶ 21,286 (Oct. 24, 1988) (procurement of direct access storage devices for mainframe computers which process one hundred thousand requisitions per day for food and weapons to sustain military forces); *North American Automated Systems, Co.*, 88-1 B.C.A. (CCH) ¶ 20,295 (Aug. 5, 1987) (procurement of personal computers for local area network which would provide for expeditious dissemination of information on therapeutic agents for treatment of Acquired Immune Deficiency Syndrome).

77. 40 U.S.C.A. § 759(f)(5)(B). See *ISYX*, *supra* note 8, which states at 105,220:

[T]he legislature granted [the GSBCA] authority to suspend, revoke, or revise a delegation of procurement authority . . . and emphasized that [the Board] should exercise that authority to prescribe relief which is necessary to ensure compliance with certain statutes and regulations . . . , Congress has thus vested this Board with the power to grant specific kinds of equitable relief. [citations omitted].

78. *Lanier Business Products, Inc.*, 85-2 B.C.A. (CCH) ¶ 18,033 (April 2, 1985).

79. *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986).

80. See *Sperry Corp.*, 86-1 B.C.A. (CCH) ¶ 18,704 (Jan. 23, 1986) (where the protester would have received the award, but for the contracting agency's unlawful behavior).

81. 40 U.S.C.A. § 759(g)(5)(C); GSBCA Rule 35, *supra* note 35, § 6101.35.

bringing suit.”<sup>82</sup> Parties who intervene and successfully defend a protest are not entitled to recover their costs.<sup>83</sup>

### C. *Protests Before the General Accounting Office (GAO)*

The GAO’s general 10-day protest filing requirement is similar to those implemented by the GSBCA.<sup>84</sup> The GAO’s definition of interested parties is the same as the GSBCA’s, except that the contract awardee is permitted to participate as an “interested party” rather than an intervenor of right by submitting a notice of appearance to the GAO. GAO protests must be resolved within 90 days after the protest is filed rather than the 45-day period applicable to GSBCA protests.<sup>85</sup>

Upon receiving notice of a protest from the GAO, the contracting agency must refrain from awarding the contract while the protest is pending unless the agency head determines that there are urgent and compelling circumstances.<sup>86</sup> Unlike protest proceedings before the GSBCA, the contracting agency rather than the tribunal determines whether “urgent and compelling circumstances” are present and is generally not subject to question by the GAO.<sup>87</sup>

The remedies afforded to protesters before the GAO are also similar to those permitted before the GSBCA.<sup>88</sup> This includes the

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82. *Bedford Computer Corp.*, 89-2 B.C.A. (CCH) ¶ 21,827 (May 2, 1989).

83. *Commercial Data Center, Inc.*, 86-3 B.C.A. (CCH) ¶ 19,129 (July 2, 1986).

84. 4 C.F.R. §§ 2.21-21.12 (1989) [hereinafter GAO Protest Regulation(s)].

85. GAO Protest Regulation, *supra* note 84, § 21.7 (although § 21.8 permits the use of an “express option” whereby the matter could be determined in as short as 45 days).

86. GAO Bid Protest Regulation, *supra* note 84, § 21.4(a); 10 U.S.C.A. § 3553(c) & (d) (West 1987 & Supp. 1989).

87. *Alm Incorp., Tech Inc.*, Comp. Gen. Dec., B-217284, B-217284.2 (April 16, 1985); *Hawthorne Services Inc.*, Comp. Gen. Dec., B-222436 (May 30, 1986). *But see* *Universal Shipping Co., Inc. v. U.S.*, 652 F. Supp. 668 (D.C. Cir. 1987) (where the district court set aside the agency’s decision not to stay award on a finding that the agency’s decision was not based on legally relevant factors and was not even rational or reasonable).

88. *See supra* Part V(B)(3). GAO Bid Protest Regulation, *supra* note 84, § 21.6(a), provides the following:

If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation, it shall recommend that the contracting agency implement any combination of the following remedies which it deems appropriate under the circumstances:

- (1) Refrain from exercising options under the contract;
- (2) Terminate the contract;
- (3) Recompete the contract;
- (4) Issue a new solicitation;
- (5) Award a contract consistent with statute and regulation; or
- (6) Such other recommendations as the General Accounting Office determines necessary to promote compliance.



right to award protest costs and attorneys fees.<sup>89</sup> However, GAO decisions are only "recommendations," whereas GSBCA decisions are binding and appealable to the U.S. Court of Appeals for the Federal Circuit. From the protester's point of view, the GSBCA has become the preferred forum for ADPE protests. As stated by one authority on bid protests:

The GSBCA process has a good deal of appeal for protesters. Statistically, it appears easier to have a procurement stayed or suspended on a GSBCA protest than for one filed at GAO. It also appears easier to win on the merits at GSBCA than GAO, and the protester who succeeds at the Board seems more assured of a meaningful remedy, including award of bid/proposal costs. Under the terms of CICA, the procedure is also faster at GSBCA than at GAO. The one drawback for a protester at the GSBCA is the relatively high cost of bringing the case, and even that can be substantially reduced by a *pro se* action.<sup>90</sup>

## VI. GSA SCHEDULE DISCOUNTS AND PRICING

A detailed discussion of the litany of contract provisions applicable to ADPE procurements is beyond the scope of this article. Since negotiation objectives will differ with each company's product, such an analysis would be impractical.<sup>91</sup> One of the most notorious requirements of GSA schedule contracts which warrants specific coverage, however, is the requirement that schedule contractors offer the Government prices that are comparable to the company's most favored commercial customer.<sup>92</sup>

### A. *Negotiating Discounts*

The Government will base its negotiations on the contractor's commercial sales information contained in the Discount Schedule and Marketing Data (DSMD) submitted as part of the contractor's

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89. GAO Protest Regulation, *supra* note 84, § 21.7(d).

90. Schnitzer, *Bid Protests At the GAO After Synar and Ameron*, 49 FED. CONT. REP. 109, 113 (1988). However, parties who appear *pro se* may have difficulty recovering their costs in pursuing the protest. See policy expressed in *Computer Lines*, 87-1 B.C.A. (CCH) ¶ 19,403 (Oct. 9, 1986) (lay *pro se* litigants are not eligible for award of attorney's fees). But see *JSYX*, 89-2 B.C.A. ¶ 21,668 (March 9, 1989) (recovery of personnel costs for pursuing protest were determined to be reasonable and recoverable).

91. Many of the basic "boilerplate" provisions in the contract are mandated by the FAR, *supra* note 6, which the GSA will not ordinarily negotiate. Contractors are, nevertheless, strongly advised to closely examine all of the terms and conditions contained in the schedule before entering into the contract.

92. See *supra* note 24, Clause M.3, at 94. See also 47 Fed. Reg. 50,252 (1982) (GSA's policies, procedures and guidelines for negotiating schedule contracts).

offer. The "Discount Schedule and Marketing Data" information breaks down price discounts, F.O.B. points and percentage of sales for the following categories of customers: (a) dealers and retailers; (b) distributors and wholesalers; (c) state, county, city and local governments; (d) original equipment manufacturers (OEM); and (e) commercial customers in general.<sup>93</sup> The contractor will then be required to certify that the schedule prices are based on established catalog or market prices for commercial items sold in substantial quantities to the general public.<sup>94</sup> The contractor must disclose all commercial contracts on the DSMD, even those that can be distinguished from the terms offered to the Government. This includes contracts which exceed the MOL in the schedule. If the contractor is unable to certify that prices are based on "established catalog or established market prices" and that the ADPE consists of "commercial items sold in substantial quantities to the general public," the GSA can require the contractor to submit detailed cost or pricing data in order to negotiate a fair and reasonable price.<sup>95</sup> The data provided on the DSMD sheet will be used to establish the commerciality exemption from disclosing cost of pricing data. Even though the DSMD sheet is used in lieu of the Standard Form 1412, Claim for Exemption from Certified Cost or Pricing Data, contractors must certify that all data submitted under the DSMD is current, accurate and complete.

Armed with discount and pricing information provided by the contractor, the GSA will then negotiate for the best discounts given to the schedule contractor's commercial customers. Manufacturers who sell only through OEM/dealers at substantial discounts or who do not have sufficient "commercial sales" often arrange for a dealer/distributor to be placed on the schedule instead. Such an arrangement is usually less profitable to the manufacturer than selling to GSA directly.

Contractors, however, may negotiate discounts offered to the GSA by differentiating the schedule arrangement from the contractor's commercial contracts. Contractors bear the burden of justifying the charging of a higher discount to the Government than given to its other customers. Unless the contractor is able to show that such sales were made under terms and conditions different from

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93. See *supra* note 24, Clause K.25, at 59.

94. See *supra* note 24, Clause M.1, at 91-92.

95. *Id.* See generally FAR, *supra* note 6, at 15.8 (prescribing the Government's cost and price negotiation policies and procedures). The requirement to submit detailed cost or pricing data is mandated by the Truth in Negotiations Act. Pub. L. No. 87-653, 10 U.S.C.A. § 2306(f) (West 1983 & Supp. 1989).

those under the schedule, the GSA will seek to achieve the contractor's most favorable discounts. Although there is sparse case law on the justifications the GSA is willing to accept, the language contained in the schedule states that the GSA will consider justifications based on the following general reasons:

- (a) a particular customer's contract arrangement is fundamentally different from the arrangement under the schedule;<sup>96</sup> or
- (b) the Government is receiving essentially the same discount, except for minor differences which can be distinguished.<sup>97</sup>

Justifications frequently used by schedule contractors can include differences based on transportation costs, warranties, quantity commitments, ancillary services purchased, exclusivity of purchases, and duration of contract. Traditionally, the GSA has also recognized exceptions for discounts offered to bona fide OEM's and dealers or distributors.<sup>98</sup> The contractor must establish that the dealer is performing normal dealer functions which are different from those to be performed by the Government.<sup>99</sup> In order to exclude sales to OEM's, the contractor must claim that there are considerable differences in physical or performance characteristics from the products offered to the Government.<sup>100</sup>

By the end of negotiations, the GSA and the contractor will have identified a customer or category of customer upon which the GSA's price discount will be based.<sup>101</sup> The contractor should ensure that a specific customer is clearly identified in the contractor's Best and Final Offer (BAFO) in order to avoid conflicting interpretations. Also, by designating a specific customer, the Government will be prohibited from "cherry picking" discounts offered to a wide group of identified customers.

### B. *Price Reduction Provisions*

The "Price Reduction for Defective Pricing Data" clause applies to events which occur prior to award of the contract during the price negotiation phase.<sup>102</sup> Under this provision, the Govern-

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96. See *supra* note 24, Clause M.1, at 92.

97. *Id.* For instance, a 1.5% price difference may be justified where the F.O.B. point is destination vs. origin.

98. See GSA Multiple Award Schedule Procurement; Nonce of Procurement Policies, 47 FED. REG. 50,242 (Nov. 5, 1982)

99. *Id.*

100. *Id.*

101. See *supra* note 24, Clause I.16, at 34.

102. See *supra* note 24, Clause I.17, at 36; Clause I.1, at 25 (incorporating by reference FAR, *supra* note 6, § 52.215-22).

ment is entitled to a price reduction if the Government discovers that the contractor failed to disclose in the contractor's "Certificate of Established Catalog Price" prices, data or facts that would have resulted in the Government negotiating a lower price.<sup>103</sup>

Defective pricing only arises when the information was reasonably available at the time of contract award and was not disclosed, thereby depriving the Government of this information during negotiations. The Government will be entitled to a reduction in price to the extent that the price was increased by the lack of adequate disclosure. If the contractor's defective pricing is reflective of an overall pattern of misconduct, the contractor could be subject to both civil and criminal penalties for defective pricing fraud.<sup>104</sup>

A second "Price Reduction" clause applies to discount information that arises after award and allows the Government to obtain a comparable price reduction if the contractor offers a more favorable discount to the most favored customers identified in the schedule at any time during the term of the GSA schedule.<sup>105</sup> The price reduction clause applies to discounts offered to both government and non-government customers.

As stated in the "Price Reduction" clause contained in the schedule:

If, after the date of the conclusion of negotiations, contractor (i) reduces the prices contained in the commercial catalog, pricelist, schedule, or other documents (or grants any more favorable terms and conditions) offered by the contractor and used by the Government to establish the prices with the contract; or (ii) reduces the prices through special discounts to the identical customer or category of customer's upon which the award was predicated so as to disturb the relationship of the Government to that identified customer or category of customers, a price reduction shall apply to this contract for the remainder of the contract period, or until further reduced, or, in the case of temporary price reductions, for the duration of any temporary price reduction period.<sup>106</sup>

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103. *Id.*

104. False Claims Act (Criminal), 18 U.S.C.A. § 287 (West 1969 & Supp. 1989); False Claims Act (Civil), 31 U.S.C.A. § 3729 (West 1983 & Supp. 1989); False Statements Act, 18 U.S.C.A. § 1001 (West 1976 & Supp. 1989). See 53 Fed. Cont. Rep. 125 (reporting of a qui tam suit, *U.S. ex rel. Marcus v. NBI, Inc.*, DC No. 89-1605, brought under the False Claims Act seeking in excess of \$2.2 million in overcharges and \$6.6 million in treble damages when GSA auditors subsequently discovered that the contractor had entered into two undisclosed national account agreements containing discounts far in excess of those given to the agency).

105. See *supra* note 24, Clause I.16, at 34-35.

106. *Id.*

The above clause does not apply to firm fixed-price contracts for definite quantities with specified delivery in excess of the contract's MOL.<sup>107</sup> Any applicable price reduction will be calculated based on the actual monetary price reduction granted so that the Government pays no more than the same low price granted to the identified customer.<sup>108</sup> Because the reduction will be effective as of the time the discount was offered, a discount which goes undiscovered for a significant period of time could require the contractor to refund a sizable amount.

Although provisions for price reductions based on discounts to federal agencies are contained in the schedule, language preceding these clauses clearly exempt them from application to ADPE schedule contracts.<sup>109</sup> Thus, discounts to federal agencies arising after contracts award need not be disclosed.

### C. Discount Reporting Requirements

The "Price Reduction" provisions contained in the schedule are enforced by requiring contractors to report to the Government contracting officer all price reductions made during the term of the contract. The prices offered to the Government could be subject to further reduction if the contractor offers greater discounts to the identified customer or fails to comply with the reporting provisions of the contract. Contractors must notify the contracting officer in writing of "any price reduction" no later than ten days after its effective date.<sup>110</sup> A contractor's failure to provide timely notice of any discounts could result in the following penalties:

- (a) The undisclosed price reduction (including temporary price reductions) will be applied to the contract retroactively from the date the price reduction was granted until expiration of the contract, or until the price is further reduced;<sup>111</sup> and

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107. *Id.*

108. *3m Business Product Sales, Inc.*, 78-2 B.C.A. (CCH) ¶ 13,362 (July 25, 1978), *aff'd on reconsideration*, 79-1 B.C.A. (CCH) ¶ 13,567 (Nov. 29, 1978) (GSA's Board of Contract Appeals recognized that the price reduction provision was not intended to be punitive and rejected the GSA's argument that the Government should obtain an additional percentage discount equal to the discount granted to the commercial customer).

109. *See supra* note 24, Clause I.16, at 34-36.

110. *See supra* note 24, Clause I.16, at 34-35.

111. *Id.* Although the clause requires the reporting of all discounts, no guidance is offered whether priced reductions that do not disturb the government's price relationship must be disclosed. Based on a literal interpretation of the language contained in the clause, a price reduction could apply to all undisclosed price reductions for items covered by the schedule, whether or not they can be justified. In support of the broader interpretation, the "Price Reduction" clause states that this information will be utilized for negotiations of any future schedule contracts. *Id.*

- (b) The undisclosed price reduction could serve as the basis for termination of the contract for default.<sup>112</sup>

As a final assurance that the Government has not been denied any discounts which could be subject to a price reduction, the contractor will be required to furnish a statement within ten days after the end of the contract period certifying either that there were no applicable reductions or that any price reduction was reported to the contracting officer.<sup>113</sup>

The GSA is entitled to conduct an audit of the contractor's compliance with the discount and pricing requirements pursuant to the "Examination of Records" clause of the contract.<sup>114</sup> The examination will cover only those records reasonably necessary to verify the contractor's compliance with the certification. Because of the reporting and audit provisions of the contract, it is critical that contractors implement adequate procedures to track all discounts made and to timely provide this information to the GSA along with any applicable justifications. If the contractor improperly certifies compliance with the price reduction reporting requirements, the contractor could also be subject to civil and criminal fraud penalties.<sup>115</sup>

## VII. DISPUTE RESOLUTION

In spite of scrupulous precontract planning and diligent performance efforts, disputes between contractors and the Government are sometimes unavoidable. Contract disputes are governed by the Contract Disputes Act and the "Disputes" clause of the contract.<sup>116</sup> There are numerous contract clauses contained in the schedule contract which can give rise to requests for relief by contractors.<sup>117</sup> Under the contract disputes procedure, an aggrieved contractor will

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112. *Id.*

113. *Id.*

114. See *supra* note 24, Clause I.1, at 25 (incorporating by reference FAR, *supra* note 6, § 52.215-1); Clause I.6, reciting General Services Administration Acquisition Regulation § 552.215-70 (the GSA's supplemental regulations to the FAR (GSAR) are codified at 48 C.F.R. Ch. 5).

115. See *supra* note 101.

116. Contract Disputes Act of 1978, 41 U.S.C.A. §§ 601-613 (West 1987 & Supp. 1989); *Supra* note 24, Clause I.3, at 27 (reciting FAR, *supra* note 6, § 52.233-1).

117. Those schedule clauses which most frequently serve as the basis for a request for relief under the contract include:

(a) "Changes," *supra* note 24, Clause I.1, at 26 (incorporating by reference FAR, *supra* note 6, § 52.243-1) (permitting recovery for government directed changes as well as "constructive changes" e.g., impractical or impossible performance, Government inaction/hindrance, disagreements or conflicting interpretations concerning contract requirements);

(b) "Default," *supra* note 24, clause I.1, p. 26 (incorporating by reference

normally submit a claim or demand to the Government contracting officer for determination. A "claim" generally consists of a request for payment of money, adjustment or interpretation of contract terms, or some other form of relief requested under the contract.<sup>118</sup>

In the normal sequence of events: a dispute will arise, the contractor will submit a claim, and the contracting officer will render a final decision from which the contractor can file an appeal. In the case of a price reduction, the sequence reverses and the contracting officer will first render a final decision, usually based upon the results of an audit, and a dispute will arise if the contractor disagrees.<sup>119</sup> The contracting officer's decision will be deemed to be final unless the contractor files an appeal pursuant to the Contract Disputes Act.<sup>120</sup> While an appeal is pending, the contractor is required to diligently proceed with performance of the contract.<sup>121</sup> Simple interest on the claim begins to accrue from the date that the claim was received by the Government until payment.<sup>122</sup>

Disputes can be brought before the GSBICA or the United States Claims Court.<sup>123</sup> While claims before the GSBICA must be filed within 90 days of receipt of the contracting officer's final decision, suits with the Claims Court may be filed up to one year from the date the contractor's claim was denied.<sup>124</sup> Since the contractor's election of forums is generally held to be irrevocable, contrac-

§ FAR, *supra* note 6, at 52.249-2) (providing for defense of excusable delay and right to appeal damages for reprocurement costs);

(c) "Termination for Convenience of the Government," *supra* note 24, Clause I.1, at 26 (incorporating by reference FAR, *supra* note 6, § 52.249-2) (covers contractor's right to recover costs associated with terminating performance and wrongful default terminations); and

(d) "Price Reduction," discussed generally *supra* Part VI(B).

118. FAR, *supra* note 6, § 52.233-1(c).

119. See generally *Nashua Corporation*, 81-1 B.C.A. (CCH) ¶ 15,050, at 74,457-74,458 (April 6, 1981), in which the GSBICA stated:

The Price Reduction for Defective Pricing Data provision appears tautological, since it states that failure to agree on a reduction "subsequent to a 'final decision' by the contracting officer . . . , shall be a dispute." According to the Disputes clause, the dispute arises first and then becomes the subject of a final decision, rather than *vice versa*. Reading this provision against the Disputes clause, and giving both their literal meaning results in a perfect logical conundrum: the dispute that is to be the subject of a final decision under the Disputes clause can only arise after the final decision is rendered.

120. FAR, *supra* note 6, § 52.233-1(f).

121. FAR, *supra* note 6, § 52.233-1(h).

122. 41 U.S.C.A. § 611 (West 1987 & Supp. 1989). Interest is computed at the rate established by the Secretary of the Treasury and is published in the Federal Register for successive six-month periods.

123. 41 U.S.C.A. §§ 606 & 609 (West 1987 & Supp. 1989).

124. *Id.*

tors are advised to evaluate which forum is the most advantageous prior to filing a complaint.<sup>125</sup>

The GSBICA is by far the most experienced with issues unique to ADPE contracts. Other factors which should be considered include differences in jurisdiction, case law and procedure as well as a variety of strategic and subjective considerations.<sup>126</sup> Nonetheless, parties can expect to achieve equitable adjudication under either forum.

## VIII. CONCLUSION

ADPE schedules bring the U.S. Government's multifarious and autonomous agencies together under a single contract. Award of a schedule contract, though, does not guarantee a specific level of business. The schedule contract will, however, minimize the burden placed on companies to compete on a contract-by-contract basis for commercial items under practices which differ with each agency. Thus, the administrative expense traditionally associated with government contracts will be reserved for competing on Department of Defense purchases exempted from the GSA's authority or agency orders in excess of the \$300,000 threshold established for ADPE schedule purchases.

The patchwork of regulations, statutes and procedures applicable to the Federal procurement of ADPE can be complicated for both contractors and the Government alike. Bid protests are likely to abound unless agencies improve their practices under schedule contracts by (a) evaluating and documenting lowest cost alternatives before making purchases; (b) adequately synopsisizing purchases in the CBD; and (c) avoiding the splitting of large orders to evade schedule order limitations. However, the greatest chal-

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125. *Aviation & Transportation Properties, Inc. v. United States*, 11 Cl. Ct. 87 (1986).

126. Both forums encourage alternative dispute resolution methods. Reasonable legal fees and costs in pursuing the matter can be recovered in either forum if (a) the contractor's business has a net worth less than \$7 million at the time the suit was initiated, (b) the contractor employed no more than 500 personnel at the time the suit was initiated and (c) the record demonstrates that Government's actions were not "substantially justified." Equal Access to Justice Act, 5 U.S.C.A. § 504 (West Supp. 1989) & 28 U.S.C.A. § 2412 (West 1978 & Supp. 1989).

The Boards of Contract Appeals are required to implement small claims procedures for claims of \$10,000 in which the resolution is expedited and the board's decision must be issued within 120 days of the contractor's election of the small claims procedure. 41 U.S.C.A. § 608 (West 1987 & Supp. 1989), *see, e.g.*, GSBICA Rule 13, *supra* note 61 (where filing of pleadings is subject to the Board's permission). For claims of \$50,000 or less the contractor may elect an accelerated procedure whereby a decision will be issued within 180 days. GSBICA Rule 14, *supra* note 61.



challenge facing schedule contractors is successfully negotiating discounts and complying with the discount reporting and certification requirements. Clearly, companies which neglect to implement policies and procedures for adequately controlling company-wide discounts for items subject to an ADPE schedule are taking a significant risk by accepting an ADPE schedule contract.